FILED BY CLERK
OCT 29 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CHRISTOPHER DAVID SHORTMAN, Appellant.	)	2 CA-CR 2007-0296 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20061019

Honorable Howard Fell, Judge Pro Tempore
Honorable Richard S. Fields, Judge

AFFIRMED

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P E L A N D E R, Chief Judge.

¶1 After a jury trial held in his absence, appellant Christopher David Shortman was convicted of trafficking in stolen property. The trial court sentenced him to a presumptive 3.5-year prison term. On appeal, Shortman argues the court erred in denying his motion to sever his trial from that of his codefendant, Richard Bierle. Finding no error, we affirm.

Background

¶2 We view the facts in the light most favorable to sustaining the conviction. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). In February 2006, K., a Pima County Sheriff's deputy, was leaving his home when he noticed Shortman and Bierle near Shortman's house across the street. Upon returning home about an hour later, K. immediately discovered that someone had been in his house, noting a desk had been moved and a television set turned over. K. reported the break-in and told the investigating officer he suspected Shortman and Bierle were the perpetrators.

¶3 While the officer was completing paperwork in her patrol car, K. saw a familiar vehicle drive into, then immediately back out of, Shortman's driveway. The officer stopped the car, which Bierle was driving, and found in plain view property that had been stolen from K.'s home. Other items from K.'s home were found later at a pawn shop. Shortman, seen with Bierle on store-security videotape, had pawned the items. Shortman was convicted of trafficking in stolen property, as charged. This appeal followed.

Discussion

¶4 In his sole argument on appeal, Shortman maintains the trial court erred in denying his renewed motion to sever his trial from Bierle's. He contends that, because "the State failed to keep its promise" "to avoid insinuating that [he] was responsible for the burglary and theft allegedly committed by the co-defendant," the court should have granted the motion. We review a trial court's denial of a motion to sever trials for a clear abuse of discretion, which "is established only when a defendant shows that, at the time he made his motion to sever, he had proved that his defense would be prejudiced absent severance." *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). "When a defendant challenges a denial of severance on appeal, he 'must demonstrate compelling prejudice against which the trial court was unable to protect.'" *Id.*, *quoting State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983).

¶5 The trial court granted the state's unopposed pretrial motion to try Shortman and Bierle together. Later, however, Shortman moved to sever the trials. He argued his defense would be antagonistic to that of Bierle, who Shortman asserted intended to shift the blame to him.[1] Shortman also argued severance was required because the state would present evidence against Bierle "related to the burglary," resulting in a "rub-off effect" on him. After a hearing, the court denied the motion. In keeping with the prosecutor's stated intentions,

[1]Shortman does not argue on appeal that Bierle's defense was antagonistic to his. That argument is therefore waived. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

however, the court instructed the state that it could argue Shortman "was around and in a position to know of the burglary," but could not "argue that Shortman had anything to do with the burglary."

¶6 At trial, K. testified he had seen Shortman and Bierle "walking down the street" as K. and his family were leaving their home. In describing how he had first noticed the house had been burglarized, K. also testified that a computer had been "pulled way out" and that whoever had broken into the home had been "trying to get it" but "didn't have enough time." In referring to whoever had burglarized his home, K. used the pronoun "they" repeatedly. He also testified he had suspected Shortman and Bierle of committing the burglary because he had seen them outside as he and his family were leaving and, therefore, they would have known that "nobody would be in th[e] house."

¶7 Shortman objected to K.'s "continued use" of the word "they," and the trial court asked K. to clarify that, when he used "they" in his testimony, he had merely meant "however many folks had been in [his] house," whether it was "two, three, 11, [or] 21." K. testified that he did not "know who or how many were in the house." But then he again used the word "they" to refer to whoever had been in the house, and Shortman again objected. When the court asked K. if he was implying any conclusion based on his use of "they," K. said he was not. The court then told him to "say the bur[gl]ar or burglars" instead. In his next answer, K. said: "They did not get any guns, the burglars did not get any guns." From that point on, K. did not again use the words "they" or "burglar or burglars" in his testimony.

¶8 At the close of the state's evidence, Shortman renewed his motion to sever, arguing that K. had "referred to him as the suspect" and that K.'s testimony "insinuate[d] [Shortman] was connected to the burglary." He argued K.'s repeated use of the pronoun "they" violated the trial court's earlier, pretrial instruction. The trial court again denied the motion. The court did, however, give the jury a curative instruction, telling the jurors: "Mr. Shortman is not charged with burglary or theft. You must therefore disregard any statements made by [K.] or any other witness implying or suggesting that both defendants were involved in the burglary and/or theft."

¶9 "Although there is some possibility of confusion in a joint trial, in the interest of judicial economy, joint trials are the rule rather than the exception." *Murray*, 184 Ariz. at 25, 906 P.2d at 558. Pursuant to Rule 13.3(b), Ariz. R. Crim. P.,

> [t]wo or more defendants may be joined when each defendant is charged with each offense included, or when the several offenses are part of a common conspiracy, scheme or plan or are otherwise so closely connected that it would be difficult to separate proof of one from proof of the others.

But,

> [w]henever 2 or more . . . defendants have been joined for trial, and severance of any or all . . . defendants . . . is necessary to promote a fair determination of the guilt or innocence of any defendant of any offense, the court may on its own initiative, and shall on motion of a party, order such severance.

Ariz. R. Crim. P. 13.4(a). Thus, as Shortman points out, "[s]everance may be granted if one defendant might be prejudiced by a joined proceeding." *See State v. McGill*, 119 Ariz. 329,

331, 580 P.2d 1183, 1185 (1978). But, "[i]t is only when the defendant can clearly show that a severance is necessary for a fair trial that the trial court must grant a severance." *Id.*

¶10 Severance is required to prevent prejudice when:

> (1) evidence admitted against one defendant is facially incriminating to the other defendant; (2) evidence admitted against one defendant has a harmful "rub-off effect" on the other defendant; (3) there is a significant disparity in the amount of evidence introduced against each of the two defendants; or (4) co-defendants present defenses that are so antagonistic that they are mutually exclusive or the conduct of one defendant's defense harms the other defendant.

State v. Grannis, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995) (citations omitted); *see also Murray*, 184 Ariz. at 25, 906 P.2d at 558. Shortman contends three of those four factors are present here, arguing "there is substantial evidence related to the burglary incriminating . . . Bierle . . . [which] facially incriminates" Shortman; "there is significant disparity in the amount of evidence" against the two defendants; and "the substantial evidence of the burglary committed by . . . Bierle had a harmful rub-off effect on" Shortman.

¶11 As the state points out, however, "the main evidence that Bierle had committed the burglary and theft—his fingerprints at [K.'s] home and the stolen items found in the car [Bierle] was driving—does not implicate [Shortman] in those crimes." Indeed, Shortman merely argues "the evidence [wa]s connected to him through improper testimony by [K.]" But K.'s testimony that Shortman and Bierle had been outside near his home shortly before the theft was permissible, circumstantial evidence showing Shortman was "aware of and consciously disregard[ed] a substantial and unjustifiable risk that" the property he pawned

had been stolen. A.R.S. §§ 13-105(9)(c), 13-2307(A). Thus, that evidence could have been presented against him even in a separate trial. *See State v. Runningeagle*, 176 Ariz. 59, 68, 859 P.2d 169, 178 (1993) (no prejudice when evidence to which defendant objected would have been admissible at severed trial).

¶12 Additionally, although the jury possibly could have understood K.'s repeated use of the word "they" to refer to Shortman and Bierle, as Shortman apparently argues, K. ultimately clarified that he did not "know who or how many [burglars] were in the house." Thus, K. clearly explained that he was not testifying that Shortman in fact had burglarized his home. In view of that clarification, we cannot say K.'s testimony about the burglary facially incriminated Shortman.

¶13 Likewise, Shortman has not shown that his trial should have been severed due to any "rub-off" effect from evidence presented against Bierle. "The test for severance based on rub-off is whether the jury can 'keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict' as to each." *State v. Van Winkle*, 186 Ariz. 336, 339, 922 P.2d 301, 304 (1996), *quoting State v. Lawson*, 144 Ariz. 547, 556, 698 P.2d 1266, 1275 (1985). And, "rub-off warrants severance only when the defendant seeking [the] severance establishes a compelling danger of prejudice against which the trial court can[]not protect." *Id.* A trial court may use a curative jury instruction, as the court did here, to protect

a defendant from the risk of prejudice.[2] *See Grannis*, 183 Ariz. at 58, 900 P.2d at 7 ("Sometimes . . . a curative jury instruction is sufficient to alleviate any risk of prejudice that might result from a joint trial."); *see also Lawson*, 144 Ariz. at 555, 698 P.2d at 1274 ("Because a severance in the middle of a trial is a severe remedy, it should be resorted to only if prejudice flowing from a joint trial is beyond the curative powers of a cautionary instruction.").

¶14 In this case, neither the evidence nor the issues were complicated. *See Grannis*, 183 Ariz. at 59, 900 P.2d at 8 (jury could keep evidence separate when "issues were not complex, the evidence was not complicated"). Shortman was not charged with the burglary, and both the prosecutor and the court made that fact clear. *See Van Winkle*, 186 Ariz. at 339-40, 922 P.2d at 304-05 (acknowledging possible juror confusion when prosecutor treated defendants "as a unit" at trial). In addition, K.'s testimony and the other evidence against Bierle were not so "quantitatively overwhelming . . . that the jury [wa]s unable to avoid its effect when reviewing evidence against [Shortman]." *Lawson*, 144 Ariz. at 556, 698 P.2d at 1275.

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[2]Shortman relies on *United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985), for the proposition that "[n]o limiting instruction could cure this error or unring this bell." Although the court there expressed concern about the effectiveness of instructions to cure errors relating to the introduction of other acts evidence, it noted other courts' reliance on the fact that "juries must be presumed to follow limiting instructions" and concluded that Daniels had not been denied a fair trial by the joinder of an "ex-felon offense." *Id*.

¶15 As noted above, the trial court also instructed the jurors to "disregard any statements made by [K.] or any other witness implying or suggesting that both defendants were involved in the burglary and/or theft." Thus, the court properly "admonish[ed] the jury to keep separate the evidence applying to each defendant, uninfluenced by evidence pertaining to the other defendant." *Van Winkle*, 186 Ariz. at 341, 922 P.2d at 306, *citing State v. Wiley*, 144 Ariz. 525, 532, 698 P.2d 1244, 1251 (1985) ("In order to prevent juror confusion, the trial court must instruct the jury to consider the evidence against each defendant separately."), *overruled on other grounds*, *State v. Superior Court*, 157 Ariz. 541, 544, 760 P.2d 541, 544 (1988). In view of that instruction and the evidence of Shortman's guilt, including security-camera video of him pawning K.'s property at a nearby pawn shop, we cannot say Shortman was prejudiced by the joint trial.

¶16 Finally, to the extent Shortman argues that the state violated the trial court's pretrial order not to suggest he had anything to do with the burglary and that, as a result, the court should have granted his renewed motion for severance, we disagree. The court ruled the state could argue that Shortman had reason to know the property he pawned had been stolen based on his proximity to K.'s home before the theft and his having been seen with Bierle both there and at the pawn shop. The court, however, barred the state from "suggest[ing] to the jury that he committed the burglary." Nothing in the record suggests the prosecutor prompted or caused K. to use the word "they" in his testimony and, in any event, K. clarified what he meant. The state did not argue Shortman had been involved in the

burglary and, in fact, the prosecutor sought to clarify K.'s testimony in that regard. She stated in closing argument: "Shortman is charged with trafficking and only trafficking. I'm not going to stand up here and tell you that there's any evidence to show that he was involved in the burglary. Because there's none. The only one charged with burglary and theft is Mr. Bierle." And, as noted above, the trial court's instruction on this point sufficiently cured whatever possible prejudice might have arisen from K.'s testimony. In sum, the trial court did not abuse its discretion in denying Shortman's renewed motion to sever his trial from Bierle's. *See Murray*, 184 Ariz. at 25, 906 P.2d at 558.

Disposition

¶17 Shortman's conviction and sentence are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge